(3)

No. 04-571

Supreme Court, U.S.
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In The

# Supreme Court of the United States

MARY E. GORECKI,

*Petitioner,*

v.

PHILIP D. CARLSON and THOMAS R. SMITH,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The Petition for Writ of Certiorari ("Petition") identifies the following question as that presented for review:

"Whether the legal standard for determining whether a public employee can be subjected to dismissal for political reasons, first enunciated in *Elrod* and then refined in *Branti*, is vague, uncertain and unworkable in practice, as demonstrated by the circuit conflicts, thus entitling Petitioner to qualified immunity from money damages liability."

## PARTIES TO THE PROCEEDINGS

The parties are properly identified in substance in the Petition, except that Petitioner Mary E. Gorecki is no longer the Kane County State's Attorney.

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## INTRODUCTION

This case involves the claim that Petitioner Mary E. Gorecki ("Petitioner" or "Gorecki") improperly terminated Respondents Philip D. Carlson and Thomas R. Smith (collectively "Respondents," individually "Carlson" and "Smith") for the exercise of their First Amendment rights. Respondents were special investigators with the Kane County State's Attorney's office. Petitioner was a candidate for the office of Kane County State's Attorney, won the election, and assumed that office. In December 2000, immediately upon taking office and as her first official act, Petitioner fired Respondents from their jobs. Respondents claim that they were fired for political reasons, namely, their endorsement of Petitioner's opponent in the election of the Kane County State's Attorney and their questioning of her ethics after discovering that Petitioner was involved in various jobs-for-favors and kickback schemes. Petitioner admits that she fired Respondents for that activity but contends that she is entitled to qualified immunity from suit because it was not "clearly established" that political affiliation was not a legitimate requirement of the special investigator position.

## OPINIONS BELOW

The Petition correctly identifies the relevant opinions below from the United States Court of Appeals for the

Seventh Circuit (App. 1-9)[1] and the United States District Court for the Northern District of Illinois (App. 11-15).

## JURISDICTIONAL STATEMENT

Respondents do not contest this Court's jurisdiction to consider the Petition for Writ of Certiorari. Petitioner correctly identifies the basis for this Court's exercise of jurisdiction.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner correctly identifies the relevant constitutional and statutory provisions involved in this case.

## STATEMENT OF THE CASE

### A. Lower Court Proceedings

Respondents filed a second amended complaint in the United States District Court for the Northern District of Illinois alleging a First Amendment retaliation claim

[1] Throughout Respondents' Brief in Opposition to Petition for Writ of Certiorari, the following abbreviations are used to cite to relevant materials in the record: "Pet." refers to the Petition for Writ of Certiorari; "R." refers to the numbered documents in the record on appeal in the United States Court of Appeals for the Seventh Circuit; Descriptors following "R." refer to documents or exhibits appended to the numerically identified documents in the record on appeal in the United States Court of Appeals for the Seventh Circuit; "App." refers to the page number of the Appendix to the Petition for Writ of Certiorari.

(Count I) and a state law claim for defamation (Count II) (App. 17-30). Petitioner filed a motion for summary judgment on the First Amendment claim on the basis of qualified immunity (App. 31-80). Since discovery had not yet commenced, the District Court granted Respondents' motion to take limited discovery (R. 23). Pursuant to that Order, Respondents deposed John Barsanti, the former First Assistant Kane County State's Attorney and current Kane County State's Attorney following Gorecki, (App. 196-258) and David Akemann, the former Kane County State's Attorney preceding Gorecki (App. 258-319). The Respondents then responded to Petitioner's motion for summary judgment (R. 27-29). On March 12, 2003 the District Court denied Petitioner's motion for summary judgment (App. 11-15). On June 29, 2004 the United States Court of Appeals for the Seventh Circuit affirmed the denial of Petitioner's motion for summary judgment (App. 1-9).

**B. Statement of Facts**

Carlson was an investigator for the Kane County State's Attorney's Office from May of 1996 to December 1, 2000 when he was terminated by the newly elected State's Attorney, Gorecki (R. 28, Ex. 2 at ¶ 2). Smith was an investigator for the Kane County State's Attorney's Office for over two years until he was similarly dismissed by Gorecki on December 1, 2000 (R. 28, Ex. 4 at ¶ 2).

During her campaign for Kane County State's Attorney, information regarding Gorecki's involvement in a kickback scheme surfaced in Kane County (R. 15 at ¶ 18). Gorecki blamed Carlson for exposing information regarding the alleged kickback scheme in which she was involved

(R. 28, Ex. 6 at 144). Gorecki blamed Smith for authoring and circulating a letter criticizing her ethics during the election (R. 28, Ex. 7 at ¶¶ 34-35). Eventually, as a result of the discovery of her unethical conduct, Gorecki was suspended from the practice of law by the Illinois Supreme Court for a period of four months. *In re Gorecki*, 802 N.E.2d 1194, 1205 (Ill. 2003). Respondents allege that their termination for those political reasons violated their First Amendment rights.

Special investigators with the Kane County State's Attorney's office, such as Respondents, were expected to perform and did perform the ministerial tasks assigned to them by the various Assistant State's Attorneys (R. 28, Ex. 3 at ¶ 6, Ex. 4 at ¶ 5). The special investigator position was responsible for performing tasks such as locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses with the Assistant State's Attorneys (R. 28, Ex. 3 at ¶ 7, Ex. 4 at ¶ 6, Ex. 5 at ¶ 10). The bulk of the special investigator's duties was serving subpoenas (R. 28, Ex. 1 at 23-24).

Occasionally, special investigators took witness statements with Assistant State's Attorneys, but never developed opinions of or strategies for those witnesses (R. 28, Ex. 1 at 65-66, 75, 91). A special investigator's input into decisions about whether to charge someone would be limited to a factual report given to the Assistant State's Attorneys. Special investigators do not recommend that any particular decision be made as a result of their investigations (R. 28, Ex. 2 at 54-55). Respondents did not undertake independent investigations necessary for trial or post-trial sentencing (R. 28, Ex. 3 at ¶ 8, Ex. 4 at ¶ 7). Trial strategy was not discussed with the special investigators (R. 28, Ex. 1 at 24).

On the rare occasion when special investigators, including Respondents, were called upon to participate in an investigation, their job was limited to supporting primary police investigations by securing documents subpoenaed by Assistant State's Attorneys and delivering them to the attorney who requested them (R. 28, Ex. 3 at ¶ 9, Ex. 4 at ¶ 8, Ex. 5 at ¶ 10). Any and all investigations done by Respondents were closely supervised by an Assistant State's Attorney (R. 28, Ex. 3 at ¶ 10, Ex. 4 at ¶ 9). Special investigators, including Respondents, had minimal professional contact with the State's Attorney in their capacity as special investigators (R. 28, Ex. 3 at ¶ 11, Ex. 4 at ¶ 10, Ex. 5 at ¶ 19).

Special investigators, including Respondents, were never consulted during any policy-making conferences and did not participate, in any way, in policy decisions of the Kane County State's Attorney's Office (R. 28, Ex. 1 at 47, Ex. 2 at 21, Ex. 3 at ¶¶ 12-13, Ex. 4 at ¶¶ 11-12, Ex. 5 at ¶ 20). Before Respondents were hired, and during their employment, the Kane County State's Attorney's Office had no "litmus test" of political affiliation necessary to be a special investigator (R. 28, Ex. 3 at ¶ 14, Ex. 4 at ¶ 13, Ex. 5 at ¶ 29). Political affiliation was unimportant to and unnecessary for the tasks assigned to special investigators (R. 28, Ex. 3 at ¶ 15, Ex. 4 at ¶ 14, Ex. 5 at ¶ 29).

John Barsanti is a former First Assistant State's Attorney for Kane County and the current Kane County State's Attorney who took office immediately after Gorecki left office (R. 28, Ex. 1 at 8, 10). David Akemann was the State's Attorney for Kane County from 1992 through 2000, when Gorecki took office (R. 28, Ex. 2 at 7). Neither Barsanti nor Akemann is aware of any requirement that

State's Attorney's special investigators be of a certain political persuasion in order to hold that position (R. 28, Ex. 1 at 22, Ex. 2 at 12). Further, neither Barsanti nor Akemann found it necessary to impose the requirement of political affiliation upon their special investigators (R. 28, Ex. 1 at 34-40, Ex. 2 at 12). No witness has stated that political affiliation was necessary to perform the job of special investigator in a satisfactory manner. Neither Carlson nor Smith ever refused an assignment or to perform their duties as contrary to their political allegiance (R. 28, Ex. 1 at 50-51).

In March 2000, Gorecki challenged incumbent Kane County State's Attorney David Akemann in the Republican primary election (App. 44, 81). Respondents supported Akemann in his reelection campaign. Gorecki defeated Akemann and won the Republican nomination for Kane County State's Attorney (App. 41, 81).

During her campaign for Kane County State's Attorney, information regarding Gorecki's involvement in a kickback scheme surfaced in Kane County (R. 15 at ¶ 18). The uncovering of misconduct by Gorecki became the subject of an investigation by the Illinois Attorney Registration and Disciplinary Commission ("ARDC"). Gorecki blamed Respondents for her troubles before the ARDC regarding the jobs-for-favors and kickback schemes in which she was allegedly involved (App. 178-80; R. 28, Ex. 6 at 144). Gorecki also knew that Smith had authored and circulated a letter critical of her during the election (App. 182-83; R. 28, Ex. 7; R. 13).

In November 2000, Gorecki won the general election for Kane County State's Attorney (App. 44, 81). Gorecki

assumed the office of Kane County State's Attorney on December 1, 2000 (App. 44, 81). Carlson and Smith, investigators for over four and two years respectively, were terminated by Gorecki immediately upon her taking office (App. 45, 82; R. 28, Ex. 3 at ¶ 2, Ex. 4 at ¶ 2). For the purposes of her qualified immunity defense, Petitioner admits that she terminated Respondents for political reasons (Pet. 5 n.1; App. 34).

## REASONS FOR DENYING THE WRIT

This Court should deny the Petition because it merely attempts to have this Court review the application of settled law to the facts in this case. In short, there is nothing in the Seventh Circuit's resolution of the issue of qualified immunity which warrants the exercise of this Court's appellate jurisdiction on certiorari review under the criteria specified in Supreme Court Rule 10. The Court should not exercise its judicial discretion to review the decision of the United States Court of Appeals for the Seventh Circuit.

First, as discussed in Part A below, the opinion by the Seventh Circuit does not present an important question of federal law warranting certiorari review. The Petitioner cannot identify an important question of federal law because the opinion below is consistent with the decisions of this Court, the Seventh Circuit, and other Circuit Courts of Appeals. Second, as discussed in Part B below, the approach of the various Circuit Courts to the *Elrod/Branti* standard is workable and requires some case-by-case flexibility. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). Third, as

discussed in Part C below, there are no other exceptional reasons for this Court to grant certiorari review of the Seventh Circuit's application of settled law to the clear facts of this case.

### A. Petitioner Cannot Identify an Important Question of Federal Law Decided by the Seventh Circuit

The Seventh Circuit, in its opinion below, did not decide any new or novel questions of federal law. The decision below applied the longstanding legal standard applicable to a public official's termination of a publicly employed investigator for political reasons in violation of the First Amendment. The analysis by the Seventh Circuit is completely consistent with the decisions of this Court, the Seventh Circuit, and other Circuit Courts of Appeals. As such, the Petitioner fails to identify an important question of federal law.

Essentially, Petitioner invites this Court to settle the issue by holding that an investigator is *per se* subject to patronage dismissal, and thereby specifically overrule the Court's prior decisions in *Elrod,* 427 U.S. at 347, *Branti,* 445 U.S. at 507, *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990), and *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712 (1996). The Court should decline Petitioner's invitation.

The legal standard governing qualified immunity has been well-defined in the decisions of this Court. The opinion below applies the established law to the facts of this case. The case does not raise any novel or "important" federal legal questions. The qualified immunity inquiry is necessarily highly fact-specific. A decision applying the

proper law, as the opinion below, presents a question limited to factually similar cases and does not warrant certiorari review.

There was a sufficient body of law established, prior to Respondents' dismissal that held that investigators, some with much more responsibility than Respondents, were not exempted from First Amendment protection. There were, to be sure, cases that held that certain employees in especially sensitive positions could be fired for political reasons. A reasonable public official would have known that an investigator in a position such as Respondents was protected by the First Amendment. The opinion below is consistent with the decisions of this Court (Part A.1), the Seventh Circuit (Part A.2), and other Circuit Courts of Appeals (Part A.3).

### 1. The *Elrod/Branti* Standard

In *Elrod*, this Court stated the general proposition that a public employee could not be made to suffer adverse job actions because of his or her political beliefs. The Court stated the general principle that "political beliefs and association constitute the core of those activities protected by the First Amendment." *Id.* at 356. The Court concluded that patronage, in its restraint on First Amendment freedoms, was unconstitutional. *Id.* at 372-73. *Elrod* recognized that First Amendment rights are not absolute, but may only be infringed when such infringement furthers "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* at 363. Under the *Elrod* principle, the Court suggested a test of "policymaking"

or "confidential" status for determining whether particular positions were exempt from constitutional protection. *Id.* at 366-67.

In its next major decision, the Court eschewed labels like "policymaker" or "confidential employee." *Branti*, 445 U.S. at 507. *Branti* held that subjecting employees to adverse job actions for their political beliefs is allowed only if the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Id.* at 517-18. In short, an employee's First Amendment rights must yield to the government's interest only when the employee's political affiliation "would interfere with the discharge of public duties." *Id.* at 517. To justify a political discharge, the public employer must demonstrate that political fidelity is "essential to the discharge of the employee's governmental responsibilities." *Id.* at 518.

The cases of this Court imply that the determination of whether political affiliation is an appropriate requirement for an office involves an inquiry into the facts and some balancing of the nature of the employment position. *Branti*, 445 U.S. at 517-18; *Rutan*, 497 U.S. at 74. Although a position might accurately be classified as "high-level," a court must inquire into the nature of the position in order to determine whether political affiliation is a necessary job requirement. *Branti*, 445 U.S. at 518; *see also* Note, *Do Not Go Gentle Into That Good Night: The Unquiet Death of Political Patronage*, 1992 WIS. L. REV. 511, 540-41 (1992). The Court subsequently observed that "the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation

is the test the government has imposed." *O'Hare Truck Serv., Inc.*, 518 U.S. at 719.

For the purposes of qualified immunity, a determination of whether a particular employee's constitutional right to be free from patronage dismissal was "clearly established" at the time of the alleged violation necessarily entails an examination of factually similar cases. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). This Court has emphasized that the qualified immunity inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. After recognizing the dangers inherent in defining the legal right too generally, the Court summarized its cases as establishing "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

### 2. Consistent Application of the *Elrod/Branti* Standard by the Seventh Circuit

The Seventh Circuit has consistently applied the *Elrod/Branti* standard as articulated by this Court, and continued its consistent application in the opinion below: "The ultimate inquiry, however, is not a search for whether the job fits the appropriate label 'policymaker' or 'confidential,' but whether party affiliation is an appropriate requirement for performing the job." *Carlson v. Gorecki*, 374 F.3d 461, 464 (7th Cir. 2004) (citing *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 755-56 (7th Cir. 2002)).

Following the suggestion of this Court, the Seventh Circuit established a functional test to facilitate its case-by-case balancing and determine whether public employers may constitutionally make party affiliation a job requirement. The test is whether the power inherent in any given office or position authorizes the employee to provide, "either directly or indirectly, meaningful input into government decision making where there is room for principled disagreement on goals or their implementation." *Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)).

Identifying the "inherent" power of the job usually involves looking at the historical treatment of that position and, in certain cases, the work performed by the people who hold the position. *See, e.g.*, *Hudson*, 913 F.2d at 433 (evidence regarding work performed by legislative investigators considered); *Flenner v. Sheahan*, 107 F.3d 459, 465 (7th Cir. 1997) (factual record necessary to ascertain the level of autonomy or discretion in the position at issue). The Seventh Circuit has consistently applied this approach, noting that "[f]lexibility may be admirable, but when a public agency decides to match duties to personal skills and interests, rather than to job titles, it also surrenders the benefits of certainty in the *Elrod/Branti* inquiry. What the employee does becomes important." *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996).

The only case from the Seventh Circuit that has found that any kind of investigator is subject to patronage dismissal is *Hudson*, but the employees in that case were interchangeably called "investigators" and "legislative aides." 913 F.2d at 429, 433. *Hudson* involved partisan employees who worked for the politically influential city

finance committee. *Id.* at 432. The court found that given the political nature of the finance committee and the investigators' subjective input into policy decisions, the *Hudson* employees, rather than being investigators, were more akin to "legislative aides" who routinely forged policy and tactics for the committee. *Id.* Although the employees attempted to analogize their duties to that of "investigators" who were not exempt from the constitutional protections, the court found that their positions were politically influential and subject to patronage dismissal. *Id.* at 433-34. In short, *Hudson* did not determine that public employees performing the job functions of investigators were exempt from First Amendment protection.

One year later, the Seventh Circuit addressed the question, left unanswered by *Hudson*, of whether employees performing the functions of investigators could be subject to dismissal for political reasons. *Matlock v. Barnes*, 932 F.2d 658, 662 (7th Cir. 1991). In *Matlock*, the Seventh Circuit held that an investigator with the City of Chicago's law department enjoyed First Amendment protection. *Id.* at 662-63. The investigator had supported the political rival of his superior. The court held that the investigator's duties which included accepting case assignments from the attorneys in his department, investigating claims by visiting accident sites, interviewing witnesses, taking pictures, and preparing written recommendations for the attorneys, which they often adopted but were free to ignore, did not require political fidelity. *Id.* at 663-64. The court noted that the investigator did not have authority to settle cases and did not supervise anyone. *Id.* at 664. The court found that "Matlock seem[ed] not to have had as much responsibility as other law

enforcement personnel deemed by courts to be policymakers." *Id.*

The Seventh Circuit's decision in *Hernandez* is of little significance to whether the law was "clearly established" that investigators were not exempt from First Amendment protection and, thus, subject to patronage dismissal. *Hernandez* involved a state's attorney's discharge of a court stenographer, not an investigator. 98 F.3d at 294-95. Indeed, the Seventh Circuit held that the stenographer position in *Hernandez* was somewhere between the investigator position in *Matlock* and the legislative aide position in *Hudson*. *Id.* at 296. Although the law was "clearly established" with regard to the rights of investigators and legislative aides, it had not yet been "clearly established" with regard to the rights of court stenographers. *Id.* at 296-97. That the law was not "clearly established" with regard to the rights of court stenographers is of no consequence to the determination of whether the rights of investigators was "clearly established."

Petitioner attempts to confuse the issue by citing Seventh Circuit cases involving employment positions generally similar to investigators. However, the Seventh Circuit noted that "[t]he test for whether the law was clearly established must be conducted based on the specific facts of the case, and not a high level of generality." *Carlson*, 374 F.3d 461, 466 (citing *Greenberg v. Kmetko*, 922 F.2d 382, 383-84 (7th Cir. 1991)); *see also Anderson*, 483 U.S. at 639-40. Under the law of the Seventh Circuit, it was clearly established that investigators, specifically, are entitled to First Amendment protection. *See Matlock*, 932 F.2d at 662; *Carlson*, 374 F.3d at 466 (noting that "this case is remarkably analogous to *Matlock*"). Even if one considered the investigators to be police officers, the

Seventh Circuit has held that, except for certain deputies with legitimate policymaking authority, police officers maintain their right to speak out without fear of losing their jobs. *See, e.g., Lickiss v. Drexler*, 141 F.3d 1220 (7th Cir. 1998). Under the law of the Seventh Circuit, a reasonable public official should have known that investigators, such as Respondents, are not exempt from First Amendment protection.

Contrary to the assertion of Petitioner, the Seventh Circuit has not wavered in its application of the *Branti* standard more generally (App. 17). The Seventh Circuit has consistently held that the duties of the position at issue are determinative, not the actual functions performed by those who hold the position. *Carlson*, 274 F.3d at 465; *Tomczak v. City of Chicago*, 765 F.2d 633, 641-42 (7th Cir. 1985). In the opinion below, the inherent nature of the job remains determinative, while "the historical treatment of the job and to the work performed by those who presently hold the position" are merely relevant in discerning the inherent nature of the position. *Carlson*, 274 F.3d at 465. *Carlson* is completely consistent with *Tomczak*.

The above discussion demonstrates that the Seventh Circuit has consistently applied the *Elrod/Branti* standard to similar public employment positions. Accordingly, there is no meaningful intra-circuit conflict over whether investigators are entitled to First Amendment protection from patronage dismissals. After *Matlock*, a reasonable public official should have known that it is impermissible to take adverse employment action against special investigators for political reasons.

### 3. Consistent Application of *Elrod/Branti* Standard by the Circuit Courts

Petitioner attempts to identify an inter-circuit conflict over whether special investigators could be fired for political reasons. However, contrary to Petitioner's assertion, no Circuit Court has held that an investigator is exempt from First Amendment protection under the *Elrod/Branti* line of cases. Two Courts of Appeals, the Second and Fifth Circuits, have extended qualified immunity to the termination of investigators, but only because the state of the law was not "clearly established" at the time the adverse action was taken against them. *See Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1998); *Gunaca v. Texas*, 65 F.3d 467 (5th Cir. 1995). In her analysis, Petitioner conflates the issue of whether a publicly employed investigator is entitled to First Amendment protection from patronage dismissal with the issue of whether the law was "clearly established" on that point. Regardless of whether an employee enjoys First Amendment protection from politically motivated employment adverse action, the public employer is entitled to qualified immunity if that right is not "clearly established" at the time of the action. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

The First Amendment and qualified immunity questions are analytically distinct insofar as the fact that one court's determination that an employee's First Amendment rights were not "clearly established" at one point in time does not foreclose the possibility that those rights will, sometime later, become "clearly established." In other words, under the qualified immunity analysis, simply because a court held, on some past occasion, that an employee's First Amendment rights were not *a priori* "clearly established" does not mean that similar employees' constitutional rights cannot

be recognized as "clearly established" in any future case. Petitioner urges this Court to effectively freeze the constitutional rights of investigators in some pre-*Elrod/Branti* state, through the grant of qualified immunity, simply because some courts have refused to recognize, at some past time, their constitutional rights as "clearly established" retroactively. As such, the decisions in *Gunaca* and *Dunahy* are not in actual conflict with the opinion below.

In *Gunaca*, the Fifth Circuit considered whether a newly elected county district attorney who dismissed an investigator for supporting the former district attorney violated the employee's First Amendment rights. 65 F.3d at 473. The Fifth Circuit acknowledged that the investigator had sufficiently alleged that the termination violated his constitutional rights, but proceeded to consider whether those rights were "clearly established" at the time of the termination. *Id.* at 473-74. In that case, the investigator "did not address the *Branti* exception . . . , nor did he provide . . . evidence that would have supported a claim that the position of investigator does not fall under the exception." *Id.* at 474 n.6. The Fifth Circuit found that, by January 1993, "neither the Fifth Circuit nor the Supreme Court had addressed the issue of political patronage in the hiring or firing of investigators in district attorneys' offices. . . ." *Id.* at 475. However, *Gunaca* does not automatically entitle district attorneys to qualified immunity in all future cases involving investigators, especially where the investigator employees can produce evidence that the position does not fall under the *Elrod/Branti* exception. It simply does not follow that qualified immunity for termination of an investigator in January 1993, without evidence that the position was outside the *Branti* exception, translates into qualified immunity for termination of an

investigator in December 2000 with strong evidence that the position falls outside the *Elrod/Branti* exception.

The Second Circuit's decision in *Danahy* involved employees who were appointed to "investigate and prosecute charges of Medicaid fraud" as a part of a "statewide prosecutor's office designed to root out complex fraudulent schemes." 134 F.3d at 1191. A newly elected Attorney General dismissed a number of employees in the Medicaid Fraud Control Unit upon taking office in January 1995. In *Danahy*, the employees all "dealt with highly confidential matters pertaining to the exercise of prosecutorial discretion as well as investigating, auditing and case preparation duties." *Id.* The Second Circuit found that a large portion of the employees' jobs involved the execution of prosecutorial functions. *Id.* at 1191-92. In light of the employees' job responsibilities, the Second Circuit, relying on cases holding that prosecutors were not protected from dismissal for political reasons, found that the public employer was entitled to qualified immunity. *Id.* at 1192-93. However, no Second Circuit case has addressed whether it was "clearly established" that employees with duties of a ministerial investigator, without prosecutorial responsibilities, would be entitled to First Amendment protection from patronage dismissal.

As Petitioner recognizes, the opinion below is consistent, in a particularized sense, with decisions in the Sixth and Tenth Circuits. *See Bauer v. Montgomery,* 215 F.3d 656 (6th Cir. 2000); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). In each of those cases, the public employees performed duties consistent with that of a low-level investigator. *Bauer*, 215 F.3d at 661 (performed background investigations, corresponded with law enforcement officials, and interviewed witnesses); *Laidley*, 914 F.2d at

1392 (located individuals, served process, sent letters, interviewed clients, and answered telephones). Accordingly, as demonstrated by *Matlock*, *Bauer*, and *Laidley*, the First Amendment rights of low-level investigators to be free from patronage dismissal was "'clearly established' in a more particularized, and hence more relevant sense" than the more generalized circumstances in *Gunaca* and *Danahy*. *Anderson*, 483 U.S. at 640. Finally, it is not necessary that this Court have previously decided the narrow issue of the First Amendment rights of investigators for Petitioner to be given fair warning that her conduct violated the Respondents "clearly established" rights. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) (Courts of Appeals decisions are "relevant authority" in determining if there is qualified immunity.).

Further, the opinion below is clearly consistent with the "clearly established" law of the Third, Sixth, and Ninth Circuits. *See DiRuzza v. County of Tehama*, 206 F.3d 1304, 1310-14 (9th Cir. 2000); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3d Cir. 1992). The Third Circuit held that political affiliation was not an appropriate job requirement for a sheriff's department employee who was responsible for serving process, transporting prisoners, and securing courtrooms. *Burns*, 871 F.3d at 1022-23. Similarly, the Sixth Circuit found that political affiliation was not an appropriate job requirement for a rank-and-file sheriff's department employee. *Hall*, 128 F.3d at 429. On facts very close to *Burns* and *Hall*, the Ninth Circuit found that summary judgment for the defendant was not appropriate when there was little to support the proposition that political fidelity was necessary to the sheriff's deputy position. *DiRuzza*, 206 F.3d at 1309-11. *DiRuzza* explained

that decisions of other Circuits, holding that similarly titled positions were subject to dismissal, were consistent with its decision because of the difference between the nature of the positions. *Id.* at 1311-12. The weight of the decisions of the Circuit Courts gave Petitioner clear warning that her actions violated the "clearly established" rights of Respondents.

Even assuming *arguendo* the law was not completely settled between the various Circuit Courts with regard to whether investigators are entitled to First Amendment protection from patronage dismissal; this does not automatically entitle Petitioner to qualified immunity. The agreement among the Circuits is that it is "clearly established" that low-level, ministerial investigators, such as Respondents, are entitled to First Amendment protection from patronage dismissal. Moreover, Petitioner was not a multi-circuit actor, she performed all of her functions as prosecutor within Kane County, Illinois and the Seventh Circuit; Gorecki should not be entitled to qualified immunity by manufacturing superficial conflicts among the various Circuit Courts. In short, the decisions of this Court and the various Circuit Courts of Appeals represent the only law on which Petitioner could have reasonably relied in making her decision to terminate Respondents. It was "clearly established" in December 2000, under those decisions, that Petitioner's actions violated the rights of Respondents.

### B. The *Elrod/Branti* Standard is Workable in Practice

Next, Petitioner engages in a lengthy, and largely irrelevant, dissertation on the inherent vagueness of the

*Elrod/Branti* formulation. In her survey of the decisions of the various Circuit Courts, Petitioner again attempts to manufacture a split between the Circuits by differentiating their approaches to determining whether a public position affords an employee First Amendment protection from dismissal for political reasons. Regardless of whether the various Circuits examine slightly different factors in their implementation of the *Elrod/Branti* standard, the law was "clearly established," under *Elrod/Branti*, that Petitioner could not dismiss a low-level employee, such as Respondents, for activities protected by the First Amendment.

Following *Elrod* and *Branti*, the Circuit Courts have employed remarkably similar approaches to determine whether political affiliation is a necessary requirement for the public employee's position. In order to determine whether political affiliation is a necessary requirement for the position at issue, each of the Circuits looks to the inherent nature of the position as the determinative factor. Although the inherent nature of the position remains determinative, the Circuits sometimes consider the actual duties performed by the position as relevant evidence. While none of the Circuits have adopted *per se* rules based on job title, the Circuits have developed a uniform approach to determining which positions are protected by the First Amendment based on the nature of the position at issue. Each of the Circuits considers the actual duties performed by the position relevant to the ultimate question of the nature of the position.

The First Circuit has held that, "absent ambiguity in the official job description, the analysis [of whether political affiliation is an appropriate requirement for effective performance] must focus upon the 'powers inherent in a

given office, as opposed to the functions performed by a particular occupant of that office.'" *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993) (quoting *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986)). Although the First Circuit's analysis focuses on the inherent nature of the position, this will not bar evidence of the actual duties performed when necessary to resolve ambiguities in the job description. *Id.*

In order to determine whether political affiliation is necessary to the job position, the Second Circuit attempts to discern the duties inherent in the position. *Gordon v. County of Rockland*, 110 F.3d 886, 888 (2d Cir. 1997). However, the fact that the inherent duties of the position control does not mean that the duties performed by an employee may not be considered in that determination. *Id.* (citing *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("[W]e do not merely look at her actions taken while in office. Rather, we also look at the power with which she is vested by law, and which is inherent in the office.")).

Courts in the Third Circuit "are also advised to look to the 'function[s] of the office in question and not the actual past duties of the particular employee involved.'" *Boyle v. County of Allegheny*, 139 F.3d 386, 397 (3d Cir. 1998) (quoting *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1349 (3d Cir. 1994) and citing *O'Connor*, 994 F.2d at 911). As the other Circuits have recognized, the Third Circuit acknowledges that, "[a]lthough actual past duties are not determinative, they may be informative." *Id.* (citation omitted).

The Fourth Circuit examines the particular responsibilities of the public employee's position in order to determine if political affiliation is necessary to that position.

*Knight v. Vernon*, 214 F.3d 544, 549 (4th Cir. 2000) ("specific duties of the public employee's position govern whether political allegiance to her employer is an appropriate job requirement") (explaining *Jenkins v. Medford*, 119 F.3d 1156, 1165 (4th Cir. 1997)). As with other Circuits, the Fourth Circuit considered the plaintiff's job duties relevant to this ultimate determination. *Id.* at 549-50.

As with the other Courts of Appeals, the Fifth Circuit determines whether the inherent nature of the aggrieved employee's position requires a certain political affiliation for effective performance. *Gentry v. Lowndes County*, 337 F.3d 481, 487-88 (5th Cir. 2003) (citing *Hoard v. Sizemore*, 198 F.3d 205, 213-14 (6th Cir. 1999)). The Fifth Circuit has considered the actual duties performed by officeholders as relevant to this analysis. *Id.*; *Wiggins v. Lowndes County*, 363 F.3d 387, 390-91 (5th Cir. 2004) (contrasting the actual duties performed by a Road Foreman with the duties performed by the Road Manager in *Gentry*).

The Sixth Circuit holds that political affiliation is a necessary job requirement where the position at issue is inherently political in nature. *Faughender v. City of North Olmstead*, 927 F.2d 909, 913 (6th Cir. 1991). However, the Sixth Circuit requires courts to "look beyond the mere job title and examine the actual duties of the specific position." *Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). While the Sixth Circuit identified categories of positions that are inherently political, the actual duties performed by employees in the position may be relevant to a determination of whether a position falls into one of those categories when the inherent nature of the position is unclear. *McCloud v. Testa*, 97 F.3d 1536, 1560-62 (6th Cir. 1996).

As illustrated by the opinion below, the Seventh Circuit merely stated that it looks "to the historical treatment of the job and to the work performed by those who presently hold the position to determine the inherent nature of the job." *Carlson*, 274 F.3d at 465. This approach is consistent with *Branti* and the cases of other Circuits.

The Eighth Circuit, citing the First Circuit's opinion in *O'Connor*, has also considered the actual duties performed relevant, but not determinative, to whether political affiliation is an appropriate requirement for the position. *Johnson v. City of West Memphis*, 113 F.3d 842 (8th Cir. 1997). The inherent nature of the position still controls the outcome. *Id.*

The Ninth Circuit examines several factors, in conjunction with the duties actually performed, to determine whether political affiliation could be a requirement for the position at issue. *DiRuzza*, 206 F.3d at 1310. Although the Ninth Circuit states that "[t]he critical inquiry is the job actually performed," the factors considered by the Ninth Circuit are more akin to those evaluated by the other Circuits in determining the inherent nature of the position. *Compare Fazio v. County of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997) ("vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders"), *with Jimenez Fuentes*, 807 F.3d at 242.

In order to determine whether political affiliation is necessary to the position, the Tenth Circuit analyzes "the inherent powers of the positions and the actual duties

performed." *Jantzen v. Hawkins*, 188 F.3d 1247, 1253 (10th Cir. 1999). However, the public employer ultimately bears the burden of proving "whether political association was an appropriate requirement for the effective performance of the public *office* involved." *Id.* (emphasis added). Thus, the actual duties performed are relevant, but not necessarily dispositive, in a *Branti* inquiry.

The Eleventh Circuit has similarly held that "[t]he inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, should be part of the analysis." *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996).

Finally, petitioner attempts to shoehorn an additional issue for review into her Petition by attempting to identify divergent approaches among the Circuits in determining whether to apply the *Connick/Pickering* test or the *Elrod/Branti* standard. *Connick v. Meyers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). However, this Court has already considered a patronage case involving retaliation based on intermixed political expression and political affiliation. *O'Hare Truck Serv.*, 518 U.S. at 714-15; *see also* Lohr, *Employer's Motivations: The Framework for Analyzing First Amendment Rights of Political Acivity in* O'Hare, 8 GEO. MASON U. CIV. RTS. L. J. 65, 75 (1997-98). In light of this Court's decision in *O'Hare Truck Service*, there is no real dispute over this issue. 518 U.S. at 719-20. As the Court explained in *O'Hare*,

> [a] reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed

> with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable. This case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in . . . the delivery of governmental services.

*Id.* The cases that Petitioner cites for the proposition that the Seventh Circuit decides political speech cases solely under *Elrod/Branti*, as an exception to the *Connick/Pickering* test, were decided before *O'Hare Truck Service* (App. 22). *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993). Further, Petitioner's actions violated the "clearly established" rights of Respondents under either the *Connick/Pickering* test or the *Elrod/Branti* standard and this argument is of no consequence to the outcome of this case. In any event, in this case, the lower courts have not had the opportunity to consider whether *Connick/Pickering* balancing is necessary and apply that standard. Instead, Petitioner moved for summary judgment on the immediately fatal issue of qualified immunity – that it was not "clearly established" that political affiliation was not a necessary requirement for the job of special investigator. After further discovery, the lower courts may, in fact, determine that the *Connick/Pickering* balancing applies. This issue is not ripe for this Court's consideration.

### C. There Are No Exceptional Circumstances Warranting Certiorari Review

As discussed above, there is no important issue of federal law to be settled by this Court. Further, the principles of *stare decisis* weigh heavily against overruling the *Elrod/Branti* line of cases and the balancing they require.

The principles of *stare decisis* caution against adoption of a *per se* rule that certain public employees, namely investigators, are subject to patronage dismissal under the First Amendment. The Seventh Circuit has applied well-settled qualified immunity principles to the particular facts of this case. Further, the reasoning and result reached by the Seventh Circuit were correct and just, making it unnecessary for this Court to intervene to correct an injustice. As the Court clearly states in Rule 10, a petition for certiorari is "rarely granted." Under these circumstances, Petitioner has not shown that there is any exceptional element that justifies review.

## CONCLUSION

For the foregoing reasons, Respondents Philip D. Carlson and Thomas R. Smith respectfully request that this Court deny the Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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